PUBLIC PROSECUTOR

v.

ROSLIM BIN HARUN

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK B. HJ. ISHAK JC
[CRIMINAL TRIAL NO. 58-8-92]
20 MAY 1993

CRIMINAL LAW AND PROCEDURE: Dangerous Drugs - Trafficking in cannabis - Informer introduced police corporal as buyer of drugs to Accused - Police corporal acted as a agent provocateur - Transaction was between Accused and agent provocateur - Two previous transactions concluded before date of arrest - Whether evidence that Accused on previous occasions sold dangerous drugs is admissible - Prejudicial to Accused - Transactions on previous occasions ruled as admissible and received as evidence.

First Information Report: Sections 107 and 108 of Criminal Procedure Code - Object of 1st Information Report - To set criminal law in motion - Whether a particular information amounts to first information or not is essentially a question of fact - Statement recorded after commencement of investigation - Police report lodged after arrest of Accused and seizure of drugs - Whether report is first information report or statement under s. 112 Criminal Procedure Code - Duty on prosecution to supply copy of report to defence - Priviliged document.

Cautioned Statement: Whether statement voluntarily made depends on facts of each case - Handcuff on right hand of Accused was opened where as handcuff still left dangling on left hand - Whether any material on record to hold Accused was threatened or beaten - If making of statement appears to Court to be caused by any inducement, threat or promise no such statement shall be admissible - Section 37A(1)(a) Dangerous Drugs Act 1952 - Evidence of recording officer conflicts with statement recorded - Sections 91 and 92 Evidence Act 1950 - Whether statement must be volunteered by Accused to render it admissible in evidence - Trial-within-trial to determine whether statement given voluntarily - Whether material nor relevant to decide whether cautioned statement was true.

Defence of Accused: Conduct of Accused prior to arrest - Whether reflected conduct of drug trafficker - Conduct of Accused in running away and throwing sling bag with its contents - Whether this conduct is capable to infer guilty knowledge on part of accused - Accused did not call any witness to support his version of defence - Whether duty of Court to speculate as to reasons for not calling witnesses - Adverse inferences - Whether any adverse inference can be drawn - Choice of accused to adopt any means or any particular course - Defence did not cross-examine prosecution witness on material particular - Whether failure to cross-examine deemed to be admission of that part of evidence - Demeanour of accused - Section 271 CPC.

The Accused was charged with trafficking in dangerous drugs, to wit, cannabis weighing 925.77 grammes at about 8.15 p.m. on 20 January 1990 at Jalan Besar Pekan Sungai Baru, Selinsing, Samanggol Bagan Serai, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s. 39B(2) of the same Act.

Held:

[1] Upon a careful scrutiny of the evidence adduced by the prosecution, the Court was satisfied that the prosecution had in fact raised the presumption under s. 37(d)(da)(vi) of the Dangerous Drugs Act 1952 (Act 234). Accordingly, the prosecution had made out a *prima facie* case, which if unrebutted, would warrant the conviction of the Accused, s. 180 CPC and the accused was called upon to enter his defence.

[2] Having considered the totality of the evidence adduced, on a balance of probabilities, the accused was selling the cannabis, fully aware and conscious of the cannabis in his possession, for monetary gain. The defence evidence viewed against the prosecution evidence clearly shows he was involved in trafficking the drugs in question.

[3] In the circumstances, the Accused had failed to rebut the presumptions under s. 37(d) & (da)(vi) of the Dangerous Drugs Act 1952 on the balance of probabilities.

[*Accused found guilty, convicted and sentenced to death*].

Cases referred to:

Wong Yew Ming v. PP [1990] 2 CLJ 946/[1991] 1 MLJ 31 SC ***(foll)***

Daimon v. PP [1951] MLJ 11 and [1953] MLJ 23 (CA) ***(refd)***

Imji v. State of Rajasthan [1980] Raj. Cr. 231 at 236 ***(refd)***

Nania v. State of Rajasthan [1980] Raj Cr. C. 208 at 211 ***(refd)***

Martin Rhienus v. Sher Singh [1949] 15 MLJ 201 ***(refd)***
Methuram Dass v. Jaggannath Dass (ILR 28 Cal 794) ***(refd)***
Husdi v. PP [1979] 2 MLJ 304 ***(refd)***
Abu Bakar v. PP [1970] 2 MLJ 216 at 218 ***(refd)***
Abdul Mahmud v. PP [1980] 2 MLJ 50 ***(refd)***
DPP v. Ping Lin [1976] AC 574 ***(refd)***
Public Prosecutor v. Ibrahim bin Mastari [1980] 2 MLJ 189 ***(refd)***
Hem Raj v. State of Ajmer [1954] AC 462, 55 ***(refd)***
Public Prosecutor v. Law Say Seck & Ors. [1971] 1 MLJ 199 ***(refd)***
Pyare Lal Bhargava v. The State of Rajasthan [1963] AIR SC 1094 ***(refd)***
Public Prosecutor v. Naikan [1961] 27 MLJ 147 ***(refd)***
Wong Kam Ming v. The Queen [1979] 1 All ER 939 PC ***(refd)***
Loo Keck Leong v. Public Prosecutor [1992] 3 CLJ 1332 SC ***(refd)***
Haw Tua Tau v. PP [1981] CLJ 123 / [1981] 2 MLJ 49 PC ***(refd)***
Ragunathan v. PP [1982] CLJ 25 / [1982] 1 MLJ 49 ***(refd)***
Munusamy v. PP [1987] 1 CLJ 250 / [1987] 1 MLJ 492 SC ***(refd)***
Public Prosecutor v. Ahmad bin Shafie [1988] 1 CLJ 36 / [1988] 1 MLJ 255 ***(refd)***
Muharam bin Anson v. Public Prosecutor [1981] 1 MLJ 222 FC ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39 / [1992] 2 SCR1 ***(refd)***
R v. Pichimuthu [1970] 2 MLJ 143 ***(refd)***
Wong Swee Ching v. Public Prosecutor [1981] 1 MLJ 212 ***(refd)***
AEG Carapiet v. AY Derderian [1961] AIR Cal. 359 ***(refd)***
PP v. Kau Joo Huat [1988] 1 CLJ 477 / [1988] 1 SCR 293 ***(refd)***
Teh Geok Hock v. Public Prosecutor [1989] 3 MLJ 162 SC ***(refd)***
PP v. Yuvaraj [1969] 2 MLJ 89 PC ***(refd)***
Ilian & Anor. v. PP [1988] 1 MLJ 421 ***(refd)***
R v. Carr Briant [1943] KB 607 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 107. 108, 112, 180, 271
Dangerous Drugs Act 1952, ss. 2, 37A(1)(a), (2), 39B, 40A
Evidence Act , ss. 91 & 92

For the public prosecutor - Chew Soo Ho, DPP
For the Accused - K. Kumarendran & M.M. Athimulan; M/s. Kumar Sitham & Co.

JUDGMENT

Dato' Hj. Abdul Malik b. Hj. Ishak JC:
The Accused was charged with trafficking in dangerous drugs, to wit, cannabis weighing 925.77 grammes at about 8.15 p.m. on 20 January 1990 at Jalan Besar Pekan Sungai Baru, Selinsing, Semanggol, Bagan Serai, in the district of Kerian, Perak, an offence under s. 39B (1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s. 39B (2) of the same Act.

The evidence adduced by the prosecution are as follows:

ASP Badaruddin bin Zafari (PW10) attached to the Anti Narcotics Division, Police Contingent Headquarters, Ipoh, Perak in an attempt to weed out a drug trafficking syndicate operating in the areas of Bagan Serai, Selinsing and Taiping deployed a seasoned detective in the person of Lance Corporal Detective 55224 Mohd. Rais bin Ibrahim (PW5) to meet an informer at Taiping who would in turn introduce him to the target in question. PW5 was to act as a agent provocateur. Thus on 10 January 1990 at about 5.00 p.m., PW5 met the informer at the padang sarkas lama near to the Fire Brigade in Taiping. There the informer introduced PW5 as Zul to the target (identified in the course of the trial as the Accused by PW5, PW8, PW9, PW10 & PW11). After the formal introduction, the informer made his exit leaving behind PW5 and the Accused. PW5, somehow managed to gain the confidence of the Accused. A rapport was established between them. In the course of the conversation, the Accused agreed to supply ganja (hereinafter the term ganja would refer to cannabis) to PW5 at a price of RM1.50 per kartus, provided PW5 would purchase more than 100 kartus. It was agreed between them that they would meet at 7.00 p.m. on the same day (10 January 1990) at Simpang Selinsing, in the area of Semanggol for the sale of 100 kartus of ganja. Before they parted company, the Accused gave his telephone number as 801343 to PW5.

PW5 then proceeded to Hotel Meridien (in particular room number 315) at Taiping where PW10 was waiting and reported to him about his meeting with the Accused and the proposed sale of 100 kartus of ganja from the Accused on the date, place and time in question. PW10 directed Detective Constable 83312 Abdul Ghani bin Abu Bakar (PW8) to accompany PW5 as an agent provocateur to meet the Accused at the appointed time and place in question.

Both PW5 and PW8 proceeded by car bearing registration number ABF 2740 ("the same car")

to Simpang Selinsing in the area of Semanggol on 10 January 1990 at about 7.00 p.m. Upon arrival, they saw the Accused who then led them on his motorcycle bearing registration number AAC 6764 ("the same motorcycle") (PW5 & PW8 followed from behind in the same car) to Sungai Baru, in the area of Selinsing where the Accused sold 100 kartus of ganja at RM150 cash to PW5. PW8 was introduced as Fuad to the Accused by PW5. Having successfully transacted the deal, they parted company. According to PW8, PW5 told him that the transaction was successful. From there both PW5 and PW8 returned to Meridien Hotel, Taiping where PW5 reported the incident to PW10. PW5 also handed the 100 kartus of ganja to PW10.

On 12 January 1990 at 5.05 p.m. on the instructions of PW10, PW5 contacted the Accused by phone and enquired in regard to the supply of ganja. The Accused agreed to supply 400 kartus of ganja at RM1.40 per kartus on the same date 12 January 1990) at 8 .00 p.m. at pekan Semanggol . This piece of information was relayed to PW10 who then directed PW5 to proceed accompanied by ASP Mohd. Isa bin Abdul Wahab (PW9) to the place as proposed by the Accused. PW9 was also directed to play the role of an agent provocateur.

Using the same car, PW5 accompanied with PW9 proceeded on 12 January 1990 at 6.00 p.m. to pekan Semanggol. Upon arrival at about 7.15 p.m., the Accused was no where to be seen. Both PW5 and PW9 then entered Aik Hoe coffee shop and had coffee. There was still no sign of the Accused. PW9 then directed PW5 to hunt for the Accused at Selinsing area. PW5 managed to trace the Accused while driving along the direction of Selinsing. The Accused at that time was riding the same motorcycle. Both then proceeded to Semanggol town where PW9 was waiting. Upon arrival at Aik Hoe coffee shop, the Accused parked his motorcycle and got into PW5's car. PW9 also got into the same car and he was introduced as Azuan by PW5 to the Accused. The car then proceeded in the direction of Bagan Serai. It was while they were inside the car that the Accused showed a sample of the ganja. According to PW5, the Accused promised to deliver 400 kartus of ganja on the same day (12 January 1990) at 8.00 p.m. in Selinsing area. PW5 then drove the car to Semanggol and dropped the Accused there. They then parted company.

As agreed on 12 January 1990 at 8.00 p.m., the parties met at Selinsing area near to Sungai Baru where the Accused sold 400 kartus of ganja to PW5 at RM560 cash. The transaction took place in PW5's car in the presence of PW9. PW5 handed the money to the Accused in exchange for the drugs. The Accused then left the scene. On 12 January 1990 p.m., PW5 related the whole episode to PW10 at room No. 315 Meridien Hotel, Taiping and PW5 also handed 400 kartus of ganja to PW10.

At this juncture, a little digression is warranted.

In regard to the transactions on 10 January 1990 and 12 January 1990, the learned defence Counsel strenously argued against its admissibility. It was, according to the learned defence Counsel, highly prejudicial.

It would appear that evidence to show that an Accused person on previous occasions had sold dangerous drugs would be admissible. In *Wong Yew Ming v. Public Prosecutor* [1991] 1 MLJ 31 SC, Hashim Yeop A. Sani CJ Malaya (as he then was) in answering the following question of law of public interest, *viz:*

> Whether in a trial in which an Accused is charged for trafficking in respect of a particular quantity of dangerous drug, to wit, heroin, at a particular place and time, evidence may be admitted that on previous occasions he had sold dangerous drugs, although such evidence is prejudicial to the Accused?

said tersely that: "In this case the evidence of PW8 is admissible not because it tends to show that a person committing one offence is likely to commit another but to show knowledge or intention of the applicant and that the possession is not accidental."

In the circumstances, I ruled that the transactions on 10 January 1990 and 12 January 1990 are admissible and ought to be received as evidence.

I shall now return to the evidence adduced by the prosecution.

On 20 January 1990 at 3.00 p.m., (PW10) held a briefing at the Anti Narcotics Division, Police Contingent Headquarters, Ipoh. The briefing was attended by PW5, PW8, PW9, Detective Constable 86506 Zahari bin Zain and Detective Corporal 70718 Busra bin Abdul Kadir (PW6). In this briefing, PW10 directed PW5 to contact the Accused in regard to the supply of ganja. On

the same day (20 January 1990), at about 5.05 p.m., PW5 contacted the Accused by phone who agreed to supply about 5,000 kartus of ganja at a price of RM1.40 per kartus on the same day (20 January 1990) at 8.00 p.m. in Sungai Baru area, Selinsing. This information was relayed to PW10 who then directed all the police personnel present at the meeting to proceed to Taiping, Perak. The police party arrived at Taiping, Perak on the same day (20 January 1990) at about 6.10 p.m. and converged at the Taiping rest house, in particular room number 55. There another briefing session was given by PW10. This briefing session was also attended by the police personnel from Taiping police station in particular ASP Tang Yoot Leng, Detective Lance Corporal 66254 Gunalan a/l Muniandy, Detective Constable 69642 Yaacob Hashim and Detective Constable 65362 Abdul Razak bin Long. PW10 briefed his men as to their respective roles in an ambush he was proposing to conduct at Jalan Besar Pekan Sungai Baru, Selinsing, Semanggol.

In the briefing, PW10 gave RM5,000 to PW5 for the purchase of the ganja. PW5 was also instructed to flick his cigarette lighter as a signal once the ganja was shown and received by him. This signal signifies arrest. PW10 also gave each of his men a walkie talkie point to point.

After the briefing, PW5 and PW9 proceeded to Semanggol town using the same car while PW8 drove motorcar AX 5376. PW10 drove motorvan ABB9623 with ASP Tang Yoot Leng seated next to him. In the motorvan hidden out of sight, were four other police personnel, viz, Detective Constable 86506 Zahari bin Zain, Detective Lance Corporal 66254 Gunalan a/l Muniandy, Detective Constable 69642 Yaacob Hashim and Detective Constable 65362 Abdul Razak bin Long, specially assigned the task of arresting the Accused. They were directed to act swiftly in arresting the Accused upon seeing the signal given by PW5.

PW5 and PW9 arrived at Semanggol town at about 7.00 p.m. on the same day (20 January 1990). The Accused was seen waiting by the roadside. PW5 stopped his car and invited the Accused to board the car. At this time, PW8 also arrived and after parking his car, PW8 entered the car driven by PW5. The Accused also got into PW5's car. PW5 then drove the car in the direction of Bagan Serai. All these was seen by PW10 who was trailing PW5 and PW8 at a safe distance of about 50 meters in motorvan ABB 9623. While the car was in motion, the Accused showed a sample of the ganja to PW5 that would be delivered later that evening. The Accused mentioned that the ganja would be delivered in the area of Sungai Baru, Selinsing, Semanggol at 8.00 p.m. on the same day (20 January 1990). PW5 then turned his car around and drove in the direction of Semanggol. On arrival at Semanggol town, all four of them alighted from the car and entered Aik Hoe coffeeshop. They ordered coffee. In the said coffee shop, the Accused told PW5, PW9 and PW8 that he could only supply between 3,000 to 4,000 kartus of ganja. **The Accused also requested PW5 to come alone at the appointed time and place for the delivery of the ganja. The Accused himself said that he would come alone.** Thereafter, the Accused left the said coffee shop on the same motorcycle and proceeded in the direction of Jalan Kuala Gula. PW5 then boarded his car (the same car) and left the said coffeeshop leaving behind PW8 and PW9. As stated earlier; PW10 witnessed what transpired between the parties at a safe distance in motorvan ABB 9623. Meanwhile, PW9 directed PW8 to contact PW10 via walkie talkie in order to convey the message that the drugs would be delivered to PW5 alone near the night market at Selinsing, Sungai Baru on the same day (20 January 1990) at 8.00 p.m. PW8 relayed the message to PW10 as directed. On receipt of this information, PW10 proceeded by motorvan ABB 9623 accompanied with the police party to the night market at Sungai Baru, Selinsing on the same night (20 January 1990) at about 7.45 p.m. Upon arrival, PW10 parked the motorvan on the grass verge facing Jalan Besar, Taiping/Bagan Serai some 75 meters away from the night market which was in operation then. PW10 then got down from the motorvan together with ASP Tang Yoot Leng, to stretch themselves. PW10 told the four police personnel who were hiding inside the van where he would be located. At about 8.00 p.m., PW10 saw a male Malay (the Accused) riding the same motorcycle (exhibit P11) arrived at the scene and parked his motorcycle across the road opposite the motorvan. **The Accused was alone.** On seeing this, PW10 retreated 20 meters away from the Accused. PW10 directed ASP Tang Yoot Leng to leave the area and he was seen walking towards the night market at Selinsing.

At about 8.15 p.m., PW5 arrived at the scene in the same car. **PW5 was alone.** PW5 parked his

motorcar in front of motorvan ABB9623 diagonally. PW5 then walked across the road towards the Accused who was waiting near his motorcycle (exhibit P11). This was witnessed by PW10. According to PW5, the Accused told him that the supply of ganja amounting to 4,000 kartus was available and that they were located in a bag placed in the carrier of the motorcycle. PW5 switched on his cigarette lighter and took one bundle from the bag and smelled it. Then PW5 put the bundle back inside the bag. T**he Accused closed the zip of the bag, carried the bag with his right hand (memegang/ membimbit beg) with its contents across the road towards motorcar ABF2740.** While crossing the road, PW5 again flicked his cigarette lighter for the second time as a signal for the police party to arrest the Accused. However, there was no immediate reaction to his signal. PW5 walked towards the driver's side of the motor car **while the Accused still carrying the bag with its contents proceeded towards the front passenger's side of the motorcar**. PW5 entered the motorcar and sat behind the wheel **while the Accused sat at the front passenger's side and placed the bag in between the front two seats.** The front doors of the motorcar were wide open. The light from the interior ceiling of the motorcar could be seen. At that time, PW5 lighted his cigarette lighter in order to smoke a cigarette. This also serves as a signal for the police party to act. But alas, there was no reaction whatsoever. Undaunted, PW5 flicked his cigarette lighter several times on the roof of his motorcar.

PW10 saw all along PW5 flicking his cigarette lighter several times, yet there was no reaction from the police personnel that were hidden in the motorvan ABB9623. PW10 decided to approach the motorcar ABF 2740 and he did just that. PW10 approached stealthily and at a distance of 10 feet shouted "POLICE". **At the same time PW10 saw the Accused hastily carrying the bag and got out of the motorcar. The Accused was seen running towards the rear portion of motorcar ABF 2740 and at the same time throwing the bag to the ground.** PW10 gave chase and with a flying tackle managed to subdue the Accused. It was during this time that PW10 heard the door of motorvan ABB 9623 being opened and soon the arresting team assisted PW10 in arresting the Accused. After the arrest of the Accused, PW10 retrieved the bag (exhibit P5) that was located about 5 feet away from the rear portion of motorcar ABP 2740. It was a grey coloured sling bag with a zip (exhibit P5). PW10 opened the zip and examined its contents in the presence of the Accused. PW10 suspected that the contents of the sling bag to be ganja. The Accused was then directed to be brought to Semanggol police station. Before departure to Semanggol police station, PWI0 directed PW6 to bring the motorcycle AAC 6764 (exhibit P11) to Semanggol police station.

At Semanggol police station in the OCS's office, PW10 examined the contents of the sling bag (exhibit P5) in the presence of the Accused. Inside the sling bag there were two newspaper wrappers (exhibits P3C and P4B). In exhibit P3C, there were 28 bundles suspected to contain ganja. In exhibit P4B, there were 26 bundles suspected to contain ganja also. Altogether, there were 54 bundles containing 2,700 kartus suspected to be ganja (see photographs P14G, H & I). PW10 lodged a police report vide Semanggol report number 98/90. PW10 also marked all the exhibits and thereafter on 21 January 1990 at 1.00 a.m., handed them to ASP Abraham Lamack (PW11) (now retired), the investigating officer (I.O) of the case.

According to PW10, he held the sling bag (exhibit P5) together with its contents (the drugs) with him from the moment he retrieved it at the scene till he handed them to PW11. PWI0 also said that the zip of the sling bag (exhibit P5) was operational then. Now, the zip of the sling bag (exhibit P5) is defective. According to PW10 at Semanggol police station after he had marked all the exhibits he then proceeded to prepare a search list (exhibit P16).

According to PW11 on 21 January 1990 at about 1.15 a.m when he went to the scene with PW10, all the exhibits were kept in the sling bag (exhibit P5) and the sling bag was zipped up. Later the same morning when PW11 returned to his office, he removed all the contents of the sling bag (exhibit P5) for the purpose of having it photographed. And when he (PW11) attempted to operate the zip of the sling bag (exhibit P5), it jammed in the same condition as it is now.

Reverting back to the Semanggol report number 98/90 lodged by PW10, the defence sought to be given a copy of it to enable them to decide whether to tender it as a defence exhibit or to cross-examine PWI0 on it, if necessary. The

learned deputy public prosecutor strenously objected to the application, arguing that the report not being a first information report should not be given to the defence.

For the purpose of this exercise, I need only to refer to Part V, Chapter XIII of the Criminal Procedure Code. The importance of the first information report is well known. It is the basis upon which an investigation under this chapter commences. The first object of the first information report is only to make a complaint to the police officer to set the criminal law in motion. Whether a particular information amounts to first information or not is essentially a question of fact. If a person goes to a police station and definitely tells the officer in charge that an offence has been committed and that a statement is made with a view to inducing the police officer to investigate the matter, it is information relating to the commission of an offence under s. 107 of the Criminal Procedure Code. **The fact that the quantum of information is meagre does not really affect its character. It is trite law that once the police have taken active steps in investigation, any written statements written by them are not first information reports and consequently inadmissible in evidence** (*Daimon v. Public Prosecutor* [1951] MLJ 11 and [1953 MLJ 23 CA). The importance of the first information report cannot be under-estimated because it is the first version coming to the knowledge of the police and setting its machinery to motion. It is for this reason that it has been provided under s. 108 of the Criminal Procedure Code that the first information report should be sent forthwith to the concerned Magistrate. Provision of law is to safeguard against any embellishment and concoction that may be subsequently made in the first information report (see *Imji v. State of Rajasthan* [1980] Raj. Cr. Cas 231 at 236). The value of first information report is that it is the first report of an occurrence to the police and as such it is entitled to the most careful consideration by the Courts of law. Its importance lies in the fact that it is presumed to be an untutored, unplanned and unthought out version of the incident just as it reaches the police. T**herefore it follows that any statement recorded after the commencement of the investigation and after there has been some development is not only not first information but has very little or no value at all as the original story because it can be made to fit into the case as the case developed.** It is obvious that the object of first information report is to enable the Courts to have the information about a crime given before it could be developed or embellished in any manner. Where the first information report is not the product of spontaneity or it is not the first reaction of the witness to the incident the chance of embellishment and improvement in the prosecution case is not ruled out (see *Nania v. State of Rajasthan* [1980] Raj Cr. C. 208 at 211).

From a brief summary of the law as stated above, Semanggol report 98/90 lodged by PWI0 after the arrest of the Accused and the seizure of the drugs is clearly not a first information report and therefore there is no duty on the prosecution to supply a copy of such report to the defence. Semanggol report 98/90 can rightly be construed as a statement under s. 112 of the Criminal Procedure Code although it has been recorded in the book kept by the officer under s. 107 of the Criminal Procedure Code and labelled as a report *(Martin Rhienus v. Sher Singh* [1949] 15 MLJ 201). And since Semanggol report 98/90 is statement made to the police in the course of a police investigation, it is deemed to be a privileged document and there can therefore be no right to inspect such a document. As to why such statement is absolutely privileged, please see *Methuram Dass v. Jaggannath Dass* (ILR 28 Cal 794). And as stated by Syed Othman FJ (as he then was) in *Husdi v. Public Prosecutor* [1979] 2 MLJ 304, as a matter of public policy, it is undesirable for the prosecution to supply the defence with the police statements, as there is a real danger of tampering with witnesses.

In the circumstances, I ruled that Semanggol report 98/90 should not be supplied to the defence.

To return to the evidence adduced by the prosecution.

The learned deputy public prosecutor sought to introduce the cautioned statement of the Accused (ID18). As there was objection by the learned defence Counsel, the Court ordered a trial within a trial to be held to determine its admissibility. I have painstakingly followed the procedures for a trial within a trial as set out in the following cases, *viz Abu Bakar v. PP* [1970] 2 MLJ 216 at 218 and *Abdul Mahmud v. PP* [1980] 2 MLJ 50. It would not be out of place for

me to emphasise that the determination of the question as to whether the cautioned statement sought to be admitted appears to the Court to be voluntarily made depends on the facts of each case. It is entirely a question of fact which the Court in each case has to determine (see *DPP v. Ping Lin* [1976] AC 574).

Inspector Khalid bin Husin (BDB SP1) ("Inspector Khalid") recorded the cautioned statement of the Accused on 22 January 1990 at 10.15 a.m. till 11.15 a.m. on the same day. The cautioned statement (ID18) was typewritten in Bahasa Malaysia.

According to Inspector Khalid, the Accused was brought to his office by Lance Corporal Shafie ("Shafie") and Constable Thomas ("Thomas"). After the handcuff was removed, both Shafie and Thomas left the office and waited outside. The office was partitioned in such a way that anyone standing outside the office could see the person inside it and vice versa. The partition of the office is partly wood and partly glass panelling.

The first thing that Inspector Khalid noticed of the Accused was the scratch mark on the right cheek of the Accused. It was not grievous in nature. The recording was conducted in Bahasa Malaysia with the Accused narrating the story while Inspector Khalid typed it on the typewriter. However, before Inspector Khalid typed the story, he ascertained its contents with the Accused and having typed it he then read it back to the Accused to verify it. It went along like this until the whole statement was recorded. Inspector Khalid stated that he did not threaten, induce or promise the Accused to make the cautioned statement.

The learned defence Counsel cross examined Inspector Khalid and the latter agreed: firstly, that he did not ask whether the scratch mark on the right cheek of the Accused was still painful. Inspector Khalid was frank in admitting that he never thought of asking this question. Secondly, Inspector Khalid did not know whether the Accused felt pain on his right cheek at the time of recording his cautioned statement. Thirdly, Inspector Khalid did not enquire whether the Accused had his meal before recording the cautioned statement. Inspector Khalid however stated that if the Accused had not eaten, he would only record his cautioned statement if the Accused wanted to.

When the Accused (BDB SB1) ("Accused") gave his evidence in the trial within a trial, there were concerted attacks made alleging: firstly, on 20 January 1990 at about 8.15 p.m. at the scene, in the course of the arrest, a scuffle ensued. Both ASP Badaruddin Zafari and Detective Lance Corporal 66254 Gunalan a/l Muniandy took this opportunity to assault the Accused. Secondly, that on 21 January 1990 at Semanggol police station when the Accused was placed in the lock-up, ASP Badaruddin Zafari came in the night, and questioned the Accused for 10 to 15 minutes. It was during this questioning in the lock-up that ASP Badaruddin Zafari "sepak muka" the Accused. Thirdly, the police officer from Ipoh that recorded his statement threatened him. That police officer purportedly said " lebih baik cakap betul, kalau tidak saya hantam awak". However, this police officer from Ipoh was never identified nor named by the Accused. Fourthly, on 21 January 1990 at 2.45 p.m. when Inspector Leong Wan Yew and the police party proceeded to the Accused's house for the purpose of ascertaining whether there were any incriminating articles therein (especially ganja), it was alleged by the Accused that Inspector Leong threatened to detain the Accused's parents (who were then in the Accused's house) if the Accused failed to disclose the presence of drugs in the said house. Fifthly, it was alleged throughout the recording of the cautioned statement only the handcuff on the right hand of the Accused was opened whereas the handcuff was still left dangling on the left hand of the Accused. Sixthly, that Inspector Khalid stated, *inter alia*: "Apa yang awak cakap akan ditulis. Benda itu boleh digunakan sebagai keterangan di dalam Mahkamah." To the Accused, this meant that he had to give the cautioned statement since the statement may be used as evidence in Court. The accused had no choice but to give the cautioned statement. Seventhly, since the Accused had been remanded for 6 more days, the fear of being assaulted by ASP Badaruddin Zafari (just like his nasty experience in the lock-up) lingered in his mind and for that reason he decided to give the cautioned statement.

The learned deputy public prosecutor rightly called ASP Badaruddin Zafari (BDB SP7), Detective Lance Corporal 66254 Gunalan a/l Muniandy (BDB SP8) and recalled Inspector Leong Wan Yew (BDB SP4) to rebut the allegations made by the accused in the trial within a

trial (see *Public Prosecutor v. Ibrahim bin Mastari* [1980] 2 MLJ 189). All the three police personnel (ASP Badaruddin Zafari, Detective Lance Corporal 66254 Gunalan a/l Muniandy and Inspector Leong Wan Yew) categorically denied the allegations made by the Accused.

I have taken into account that mere bald assertion by the accused that he was threatened or that inducement was offered to him cannot be accepted as true without more. There must be some material on the record to hold that the accused was threatened or beaten (see *Hem Raj v. State of Ajmer* [1954] SC 462, 55 Cr LJ 1313). And that a mere possibility that the statement was not voluntary is however insufficient to warrant its rejection but a probability that the statement was not voluntary would suffice to make the statement inadmissible (see *Public Prosecutor v. Law Say Seck & Ors.* [1971] 1 MLJ 199). Now, the proviso to s. 37A(1)(a) of the Dangerous Drugs Act 1952 (Act 234) enacts that no such statement shall be admissible if the making of the statement **appears** to the Court to be caused by any inducement, threat or promise. To my mind, the crucial word is the expression "**appears**". I would venture to say that the appropriate meaning of the word "**appears**" is "**seems**". It imports a lesser degree of probability than proof. To put it simply, on the evidence and the circumstances in a particular case, it may appear to the Court that there was a threat, inducement or promise, though the said fact is not strictly proved. I must stress that it is not possible nor advisable nor proper to lay down an inflexible standard for guidance of Courts to determine voluntariness, for in the ultimate analysis it is the Court which is called upon to exclude a cautioned statement by holding, in the circumstances of a particular case that the cautioned statement was not made voluntarily. (see *Pyare Lal Bhargava v. The State of Rajasthan* [1963] AIR SC 1094).

The Court ruled that the cautioned statement of the Accused was inadmissible for the following reasons:

(1) There were patent defects in the cautioned statement (ID18) (the Court scrutinised the cautioned statement ID18 after the whole rigmarole of the trial within a trial was completed), *viz*:

(a) It did not record the scratch mark on the right cheek of the Accused;

(b) It did not record that Lance Corporal Shafie told Inspector Khalid that ASP Lamack (BDB SP2) directed that the accused be brought to Inspector Khalid's office;

(c) It did not record the word ex-navy;

(d) It did not record whether the Accused wanted to "tambah atau pinda";

(e) It did not record that Inspector Khalid examined the body of the Accused;

(f) It did not record that the Accused understood Inspector Khalid and *vice versa*.

(It is apparent therefore that the evidence of Inspector Khalid that run counter to the cautioned statement (ID18) would run foul of sections 91 and 92 of the Evidence Act and in the circumstances be construed to be an embellishment and nothing else).

(2) Throughout his evidence, Inspector Khalid did not say nor was it recorded in the cautioned statement (ID18) that he had read the provisions of Section 37A (2) of the Dangerous Drugs Act 1952 (Act 234) to the accused. Bereft of this evidence, the voluntariness of the cautioned statement (ID18) is seriously impeded. The statement must be volunteered by the Accused to render it admissible in evidence.

(3) I am constrained to believe the Accused that when Inspector Khalid told him that his statement may be used as evidence in Court he must have thought (here appears to the Court would be sufficient to trigger off the proviso to s. 37A(1)(a) of the Dangerous Drugs Act 1952 (Act 234)) that he had to give the cautioned statement. No other option was opened to him then bearing in mind that the provisions of s. 37A(2) of the Dangerous Drugs Act 1952 (Act 234) were not read to him.

(4) The lingering fear that he would be assaulted by ASP Badaruddin Zafari was accentuated by the additional 6 days remand which the accused had to undergo. It must be borne in mind that ASP Badaruddin Zafari admitted on being called by the learned deputy public prosecutor that on the night (10.00 p.m) of 20 January 1990 at Semanggol police station, he entered the lock-up where the Accused was kept, one to one, face to face, and questioned the Accused. No doubt ASP Badaruddin Zafari

denied assaulting the Accused while questioning the accused in the lock-up, yet the nagging questions to ask persisted: Why must ASP Badaruddin Zafari question the Accused in the lock-up that night? Why can't ASP Badaruddin Zafari question the Accused the next morning, after all, according to ASP Badaruddin Zafari, he merely asked about the personal particulars of the Accused and nothing else? It was put to ASP Badaruddin Zafari that he put fear in the mind of the Accused: "Awak menakutkan YKT dan beritahu dia untuk mengatakan yang betul." The Accused stated that ASP Badaruddin Zafari asked: "Lebih baik kata apa yang betul-betul." Now, those words uttered by ASP Badaruddin Zafari would in the circumstances, be sufficient inducement to deprive the cautioned statement of its voluntary character since such words like: "Lebih baik kata apa yang betul-betul" and equivalent expressions would, in my considered view, have acquired a fixed meaning and must by necessity import a threat or promise (see *Public Prosecutor v. Naikan* [1961] 27 MLJ 147).

(5) The allegation that the handcuff was not totally removed from the person of the accused was not challenged by the prosecution even though Inspector Khalid was recalled by the learned deputy public prosecutor. This means that at the time of recording the cautioned statement, the handcuff was still left dangling on the left hand of the accused. Can it therefore be said that the Accused gave his cautioned statement voluntarily?

I must say that in the course of the trial within a trial, when the learned deputy public prosecutor cross-examined the accused in regard to the truth of the cautioned statement (ID18), I had to intercede and rule that he could not proceed on this line of cross-examination. The sole issue on the *voire dire* was whether the statement had been made voluntarily. It was not material nor relevant to decide whether the cautioned statement was true (see *Wong Kam Ming v. The Queen* [1979] 1 All ER 939 PC).

To get back to the primary facts as adduced by the prosecution - the prosecution adduced sufficient evidence to establish that there was no break in the chain of evidence relating to the exhibits until they reached this Court.

In due course, the government chemist (PW3) analysed the incriminating exhibits and found that it contained 925.77 grammes of cannabis, the subject matter of the charge.

The government chemist conducted four tests: first, a physical examination, second, a microscopic examination of the plant material, third, *Duquenois Levine* (DL) test, and lastly, the Thin Layer Chromatography (TLC) test.

The government chemist found during the physical examination that the plant material to be of the same plant material with features similar to those of cannabis. Under microscopic examination, she categorically stated that she saw microscopic morphological features of the plant material were similar to those of cannabis and she also saw an abundance of resin intact on the plant material . Whereas according to her, the *Duquenois Levine* (DL) test gave a purple colour indicating the presence of cannabinoids, an active constituent of cannabis. And lastly, the TLC test showed the presence of cannabinoids in the resin.

The government chemist explained in great detail that from a combination of all the four tests, the totality of it, she concluded that the plant material in both P3G and P4F was cannabis and the cannabis resin had not been extracted. The presence of cannabis resin would appear "to be the soul of a cannabis plant" (see *Loo Keck Leong v. Public Prosecutor* [1992] 3 CLJ 1332 SC especially p. 1333).

The government chemist had stated that she examined microscopically and physically every roll of the 2,700 rolls of the plant material and found them to be of the genus cannabis. She combined and mixed the plant material in package "B" thoroughly and took 32 random representative samples for qualitative chemical tests. She also combined and mixed the plant material in package "C" thoroughly and took 32 random representative samples for qualitative chemical tests. From both packages "B" and "C" the government chemist found an abundance of resin on the random representative samples. She stated that in the field of chemical analysis, it was not necessary to weigh the samples used for qualitative tests. It would have been sufficient to take a random representative sample only. She stated that the word "extraction" in the context of s. 2 of the Dangerous Drugs Act 1952 (Act 234) would mean that the plant

material had not undergone extraction of resin by the four known methods of extraction, *viz*: threshing, rubbing, immersion in boiling water and extraction by chemical solvents. The reasons she gave are all legitimate and I am fully satisfied with them.

The learned defence Counsel cross-examined the government chemist in regard to the non-extraction of resin. However, the government chemist testified categorically that there was an abundance of resin in the plant material she examined. She even explained a step further that the plant material had not undergone any physical extraction process, either physically or chemically; that the plant material was not damaged, crushed or stripped nor broken. She stated that in the course of handling, transporting and packing, the resin will not fall off. A bit of the plant material will fall off due to this normal handling but the resin remains intact on the plant material. The resin is stuck onto the plant material.

From the tenor of her evidence, the government chemist had no doubt at all that the resin had not been extracted. That would therefore establish beyond reasonable doubt that the plant material was cannabis within meaning of s. 2 of the Dangerous Drugs Act 1952 (Act 234). Her evidence would certainly be in accord with *Loo Keck Leong's* case *(supra)* where Peh Swee Chin SCJ said: "... though it would have been that easy for him to have said that it had not been extracted, if he had no doubt about it." (p. 1334 paragraph I right column).

At the close of the case for the prosecution, the learned defence Counsel elected not to submit on the issue of no case to answer. Upon a careful scrutiny of the evidence adduced by the prosecution, I was satisfied that the prosecution had in fact raised the presumptions under s. 37(d) and (da)(vi) of the Dangerous Drugs Act 1952 (Act 234) and accordingly, the prosecution had made out a *prima facie* case, which if unrebutted, would warrant the conviction of the Accused (s. 180 of the Criminal Procedure Code), and I called on the Accused to enter his defence: *Haw Tua Tau v. PP* [1981] 2 MLJ 49 PC, *Ragunathan v. PP* [1982] 1 MLJ 49 and *Munusamy v. PP* [1987] 1 MLJ 492 SC.

The Defence

The Accused elected to give his evidence on oath and he called two witnesses to testify on his behalf.

In his defence, the Accused admitted the sale and purchase transactions of the drugs on 10 January 1990 and 12 January 1990 as narrated by the prosecution witnesses especially PW5, PW8, PW9 and PW10. The Accused also admitted the intending sale and purchase transaction of the drugs on 20 January 1990 which culminated in his arrest in exactly the same manner as narrated by PW5 and PW10. The tenor of his defence was that he was a police informer and he cooperated with the police to weed out a drug trafficking syndicate particularly a drug trafficker by the name of Khalid.

The Accused stated that through Kamsani he was introduced to PW5. This introduction took place at Kamsani's food stall located behind the fire brigade in Taiping. Before being introduced to PW5, Kamsani had enquired of the Accused whether he was interested in cooperating with the police to weed out a drug trafficking syndicate operating in Selinsing area. Kamsani even asked the Accused whether he knew Khalid. According to the accused, he knew Khalid casually, not that close. And that he (accused) had heard that Khalid was involved in ganja. According to the Accused, Kamsani requested the Accused to cooperate with the police with promise of a reward in the sum of RM5,000. Kamsani told the Accused that he (Kamsani) could not get involved as he once had acted directly in 1988 in a project by assisting the police in crippling a drug trafficking syndicate. Kamsani gave an undertaking that the Accused would not be arrested if he (accused) cooperated with the police. Thus, at Kamsani's foodstall on 10 January 1990 at 5.15 p.m., the Accused arrived and waited to be introduced to PW5. While waiting for the arrival of PW5, the Accused enquired and was told by Kamsani in regard to the price of ganja per kartus (RM1.50 per kartus for the purchase of 100 kartus or more). At about 5.30 p.m. on the same day (10 January 1990), PW5 arrived and he was duly introduced by Kamsani as a police officer by the name of Rais. According to the Accused, PW5 confirmed that Kamsani used to cooperate with him (PW5) in 1988. The Accused then asked PW5 to give an undertaking not to arrest him. PW5 then gave the undertaking. After Kamsani left, both the Accused and PW5 discussed about the sale and purchase of 100 kartus of ganja on 10 January 1990. It was during this discussion that PW5 asked the Accused to call him Zul. The Accused also supplied his telephone number

and his house address to Zul. After telling Zul to come on the same day (10 January 1990) at 7.00 p.m. and to wait 100 meters from Simpang Tiga, Selinsing, they both parted company. According to the Accused, he then proceeded to hunt for Khalid and found him at 6.30 p.m. at a Malay coffee shop near Simpang Tiga, Selinsing. Having briefed Khalid about the prospective buyer by the name of Zul, Khalid then left the said coffee shop for 10 minutes and returned with 100 kartus of ganja and requested the Accused to sell the ganja at RM150. The Accused told Khalid to wait in the coffee shop while he (the accused) proceeded 100 meters away to see Zul (who was supposed to be waiting) with the 100 kartus of ganja. The Accused then proceeded with 100 kartus of ganja on a motorcycle to see Zul 100 meters from Simpang Tiga, Selinsing. Zul was not there yet. A short while later, Zul arrived in a car with a male Malay who was introduced as Ghani to the Accused. The delivery of the 100 kartus of ganja was effected some 200 meters away from that place. This was a precaution on the part of the Accused. Zul paid RM150 to the Accused in return for the 100 kartus of ganja. They then parted company after the Accused told Zul to contact him on 12 January 1990. With the money, the Accused then proceeded to the same Malay coffee shop where Khalid was waiting and handed to him RM150. Khalid then gave the Accused RM10 as commission.

On 12 January 1990 at 5.00 p.m., Zul contacted the Accused by phone. Zul requested for 400 kartus of ganja. The Accused promised to get the said ganja and told Zul to wait at 7.00 p.m. at Simpang Empat, Semanggol. According to the Accused, he then rode his motorcycle to locate Khalid at Simpang Tiga, Selinsing. At 6.50 p.m., the Accused met Khalid at the coffee shop at Jalan Simpang Tiga, Selinsing. The Accused then told Khalid about Zul's request for 400 kartus of ganja and that Zul would be waiting at 7.00 p.m. on the same day (12 January 1990) at Simpang Empat, Semanggol. According to the Accused, Khalid was not too happy with the plan to sell the ganja to Zul at Simpang Empat, Semanggol since it was near a police station. Khalid suggested the sale and purchase of the ganja to take place at 8.00 p.m. on the same day (12 January 1990) at Sungai Baru. The Accused agreed with Khalid's suggestion.

The Accused also obtained a sample of the ganja from Khalid. Before parting company, the Accused was requested by Khalid to return to the same coffee shop. According to the Accused he requested Khalid to turn up together with him (the accused) during the delivery of 400 kartus of ganja to Zul. Khalid was said to have agreed and that Khalid expressed a desire to meet Zul.

With the sample of ganja which he had obtained earlier from Khalid, the Accused proceeded by motorcycle in the direction of Simpang Empat, Semanggol. On the way, the Accused saw Zul driving motorcar ABF 2740 and upon seeing Zul signalling him to stop, the Accused complied. Zul parked his motorcar and approached the Accused who also had parked his motorcycle and enquired in regard to the 400 kartus of ganja. According to the accused, he then told Zul that he had just met Khalid and the latter agreed to hand over 400 kartus of ganja. According to the accused, he reminded Zul not to arrest him (the Accused) during the delivery of 400 kartus of ganja. Zul gave the undertaking. According to the Accused, he told Zul that Khalid would be present during the delivery of 400 kartus of ganja. Zul then requested the Accused to follow him to a Chinese coffee shop at Simpang Empat, Semanggol. The Accused agreed and there he was introduced to a male Malay by the name of Azuan, a friend (kawan) of Zul. According to the Accused, he then suggested that they discuss about the delivery of the ganja in the car. All three entered the car with Zul behind the wheel. Zul drove the car in the direction of Bagan Serai. When the car was in motion, the Accused showed the sample of ganja that would be delivered on 12 January 1990 at 8.00 p.m. at Sungai Baru near the night market. According to the Accused, he told Zul the price of 1 kartus of ganja was RM1.40. The motorcar then turned back in the direction of Simpang Empat, Semanggol whereupon the accused alighted from the motorcar and mounted his motorcycle in the direction of Jalan Gula with the intention of meeting Khalid at the Malay coffee shop at Jalan Simpang Tiga. True enough, according to the Accused, Khalid was at the said coffee shop with three other Malays (not known to the Accused). The Accused signalled to Khalid, the latter approached the Accused wherein the accused asked for the 400 kartus of ganja. Khalid took a plastic bag which was hanging on the handle of the motorcycle and handed it to the accused. The Accused again asked Khalid to come along. Khalid told the

Accused to go first as he had some work to do. In due course, 400 kartus of ganja was sold to Zul on 12 January 1990 at 8.00 p.m. at Sungai Baru at RM560 cash. The Accused told Zul that if he wanted more supplies, he was to contact him on 20 January 1990 at 5.00 p.m.

The Accused then rode his motorcycle to Simpang Tiga, Selinsing and at a Malay coffee shop met Khalid and handed to him RM560. Khalid gave RM40 commission to the Accused. At the Malay coffee shop, the three other male Malays were still there. The Accused was not introduced to them.

In regard to the transaction on 20 January 1990, this is what the Accused said.

On 20 January 1990, after he returned from work (employed at Taiping Textile Sdn. Bhd.), the Accused went out to look for Khalid. At about 4.00 p.m., he met Khalid at a Chinese provision shop situated at a town at Simpang Tiga, Selinsing. The Accused told Khalid that Zul would come that day to buy ganja in a large quantity. Khalid enquired as to the time of arrival of Zul. The Accused replied that he did not know as the accused had yet to contact him. Khalid told the Accused that the supply amounted to 3,000 kartus of ganja only, and that the supply had not arrived. Khalid told the Accused that the supply came from Siam.

Khalid then requested the Accused to go to his house at 7.40 p.m. on the same day (20 January 1990). Khalid showed the way to his house. According to the Accused, the direction of Khalid's house was from Simpang Empat to Taiping on the right side. Thereafter, the Accused returned home.

On 20 January 1990 at 5.00 p.m., the Accused received a telephone call from Zul. Zul enquired about the supply of ganja. According to the Accused, he told Zul that Khalid told him that the ganja was available. The Accused also told Zul that there was every possibility that Khalid would be present during the delivery. The Accused then told Zul to come to Simpang Empat, Semanggol at 7.00 p.m. on the same day (20 January 1990).

The Accused then went to Khalid's house and informed him about the arrival of Zul that night. The Accused also requested Khalid to be present at the appointed time and place that is, at 8.00 p.m. on 20 January 1990 at Sungai Baru near the night market. Khalid then gave the Accused one kartus of ganja as a sample. The Accused took the sample and proceeded straight to Simpang Empat, Semanggol at 7.00 p.m. Upon arrival, Zul was already there together with Ghani and Azuan - waiting in the car. Zul invited the accused to enter the car. The Accused obliged. Then the car proceeded towards the direction of Bagan Serai. During the journey, the Accused showed the sample of one kartus of ganja to Zul. The latter agreed and kept the sample. According to the Accused, he then told Zul that the ganja would be delivered on 20 January 1990 at 8.00 p.m. at Sungai Baru near the night market. Zul then reversed the car and proceeded back towards Simpang Empat, Semanggol and upon arrival, Zul invited the Accused to enter a Chinese coffee shop. In the said coffee shop, Zul requested for 5,000 kartus of ganja. The Accused told Zul that he could only supply 3,000 kartus of ganja. The Accused also told Zul that the price of one kartus of ganja was RM1.40. The Accused also asked Zul to come alone at the place of delivery. Zul agreed.

According to the Accused, on 20 January 1990 at about 7.40 p.m., he proceeded to Khalid's house on a motorcycle. Upon arrival he saw that there were three male persons with Khalid in the house. Khalid's house was high and supported by poles. He proceeded straight to the back portion of Khalid's house and parked his motorcycle and was about to walk to the front when he saw Khalid approaching him. The Accused then returned to his motorcycle. Khalid then asked: "Macam mana, jadi?" The Accused said that he had met Zul. The Accused then asked Khalid about the supply of ganja. Khalid told the Accused to wait. Khalid left the place for 5 minutes and he then returned and handed to the accused a bag and placed it in the carrier of the accused's motorcycle: The Accused asked Khalid as to the amount of ganja in the bag. Khalid replied, "2,700 kartus". According to the Accused, the bag was opened. The handle of the zip was missing and the zip was not operational. The Accused asked Khalid to come along. Khalid told the Accused that he would come and to wait for him: "Tunggu sehingga beliau datang. Barulah penyerahan ganja boleh dibuat." Khalid also said that he would come as he wanted to see Zul.

The Accused then rode his motorcycle ladened with the bag containing the drugs in the

direction of Sungai Baru near the night market. On arrival, the Accused found Zul was already waiting. Zul's car was parked on the grass verge to the right in the direction of the night market. The Accused parked his motorcycle to the left in the direction of the night market. Zul crossed the road and approached the Accused and asked in regard to Khalid and the ganja. The Accused told Zul that the ganja was available but Khalid instructed him to wait till he arrived before the delivery could be effected. Zul wanted to see the drugs. The Accused took one bundle from the bag and showed it to Zul. Zul was seen smelling that one bundle and then he handed it back to the accused. The Accused returned that one bundle into the bag.

Zul then directed the Accused to carry the bag containing the ganja inside the car. The accused then slung the sling bag (exhibit P5) across his right shoulder and entered the car. In the car, the accused asked Zul to wait till Khalid arrived before the handing over took place. According to the Accused, as he entered the car with the sling bag, he saw Zul flicking the lighter. Zul then told the Accused that he would arrest the accused. At the same time, the Accused saw a big-sized male person approaching the motorcar. According to the Accused, he was really frightened. The Accused knew that he was being played out by Zul. He felt frightened and tried to run out of the motor car. He ran carrying with him the sling bag. While running, he threw the sling bag to the ground.

About 15 to 20 feet away while running, the big-sized male person identified as ASP Badaruddin Zafari (PW10) caught up with him. According to the Accused, as he was tackled, he fell to the ground and PW10 landed on top of him. Thereafter, the Accused was arrested.

According to the Accused, at the time of arrest he did not see Khalid. At about 9.00 p.m., the accused was brought to Semanggol police station and upon arrival there he did not see anyone being arrested. However, according to the Accused before he was brought to Bagan Serai police station, he saw and could recognise one out of the three persons whom he saw at Khalid's house. The Accused said he saw the second time this person at the Magistrate's Court, Parit Buntar when he (the Accused) was charged in Court.

According to the Accused, at Semanggol police station, in an office he, told one police officer in regard to Khalid and the three persons. The Accused also told Badaruddin when he (Badaruddin) entered the lock-up about them. The Accused said that he also told ASP Lamack at Bagan Serai police station, in particular about Khalid.

Under cross-examination, the Accused admitted that he told Badaruddin about Khalid at the lock-up of the police station and not at the scene. The Accused stated he did not feel like telling Badaruddin about Khalid at the scene. The Accused also stated that in the office of Semanggol police station he did not tell Badaruddin about Khalid. The accused agreed that he was not close to Khalid. He merely heard that Khalid was involved in drugs. He agreed that the commissions which he received from Khalid were not handed to Zul. He agreed that on 20 January 1990, he did not bring Zul, Ghani and Azuan to Khalid's house, nor did he inform them (Zul, Ghani and Azuan) about Khalid's address. He denied that the name Khalid was not in existence throughout the case. He agreed that throughout the case, Khalid was not introduced to Zul at all. He disagreed that he was not being played out by the police but being trapped by the police. He agreed that if he managed to escape he would not be charged. He disagreed that if Khalid existed, he was in fact assisting Khalid in trafficking drugs. He disagreed that the zip of the sling bag then was operational. He admitted that he was carrying 2,700 kartus of ganja on 20 January 1990. He disagreed that if Khalid really existed then Khalid was the supplier and he was the trafficker.

There was no re-examination of the Accused.

The two defence witnesses gave the following evidence.

Azman bin Saibu (DW2) stated that he was arrested on 20 January 1990 between 8.00 p.m to 9.00 p.m at Khalid's house which was located at Selinsing. He was kept in the lock-up for two weeks. He went to Khalid's house with Ramli and there he met Nayan bin Hashim (DW3). **Between the afternoon on 20 January 1990 till 9.00 p.m on the same day, while he was at Khalid's house he did not see the Accused going to Khalid's house. He did not know whether Khalid knew the Accused.** He stated that he went to Khalid's house with Ramli for a visit. And that Ramli did not know the Accused. He stated that he spoke to Nayan, Ramli and Khalid at the latter's house

for about one hour and **during that time he did not see the Accused there.** They were having coffee. He admitted, however that once in a while Khalid went inside for a short few minutes and that Khalid even went behind the house. Currently he is unable to tell where Khalid is. He stated that when the police arrived, Khalid was already at the back. He stated that he would not know when the police arrived, whether Khalid was in the house or not.

Nayan bin Hashim (DW3) admitted that on 20 January 1990 at 8.00 p.m. while he was at Khalid's house (did not know the address but knew it to be in Semanggol) he was arrested by the police. At the time of his arrest, Azaman and Ramli were also in the house. Khalid managed to escape. He stated that before his arrest, he stayed in Khalid's house for two days. During these two days, he stated that he went out with Khalid to eat.

Nayan stated that he used to see the Accused when he was detained in the lock-up. He did not see the accused at Khalid's house. He stated that he is being detained at Pusat Pemulihan at Simpang Renggam for his involvement in drugs. He was staying in Sungai Petani before he went to Khalid's house. He stated that he met Azaman and Ramli at Khalid's house on 20 January 1990. He stated that he can't remember whether he met Azaman, Ramli and Khalid at a Malay coffee shop at any time on 20 January 1990. He was positive he met Azaman and Ramli at Khalid's house on 20 January 1990. **He stated that on 20 January 1990 he did not know the Accused.** He stated that when he went out to eat with Khalid he never met the Accused. He did not see the Accused meeting Khalid while he was at Khalid's house or when he went out to eat or while eating. **Particularly on 20 January 1990 at 7.40 p.m., he did not see the Accused coming to meet Khalid even though at that time he was with Khalid.** He did not see anyone coming to Khalid's house riding a motorcycle. **On 20 January 1990 he categorically stated that the Accused did not come to meet Khalid.** He was positive before his arrest on 20 January 190 that no one came to Khalid's house. He knew Khalid to be a padi planter. He did not know that Khalid was a ganja drug trafficker. **He admitted meeting the Accused for the first time that night while he was detained in the lock-up.** Before that he never met the Accused whether at Khalid's house or else where. As for Azaman and Ramli, he stated that he met them on the night of the arrest and prior to that he stated that he never met them. He stated that in this case, he is not involved in drug trafficking. Under re-examination, he stated that they were having coffee at Khalid's house. The coffee was prepared by Khalid's wife. He can't remember how long they were conversing. He can't remember whether during the conversation Khalid left the premises. He described Khalid's house as a kampong house. And that if there was anyone coming to the house from the back he could not see. He could see the movements of Khalid's family in the house.

I must now evaluate the evidence for the prosecution and the defence.

Clearly, the star witnesses for the prosecution were PW5, PW8, PW9 and PW10. I was very much impressed by their demeanour and the contents of their testimonies. They were completely composed, gave their evidence in a straight forward and truthful manner. There was also nothing improbable in their evidence. I would go further and say that I accepted the evidence of these witnesses as wholly reliable. I am mindful that in considering the defence in its totality, I have to consider, *inter alia*, whether the evidence of PW5, PW8 and PW9 are creditworthy. Their evidence do not require corroboration. They are agents provocateur and not accomplices. In any event under s. 40A of the Dangerous Drugs Act 1952 (Act 234) **no agent provocateur** shall be presumed to be unworthy of credit by reason only of his, *inter alia*, having abetted the commission of an offence by any person under the Act if the abetment was for the sole purpose of securing evidence against such person.

It must be borne in mind that the accused in his defence, admitted in material particulars, all the incriminating evidence against him. The sale and purchase of the ganja on 10 January 1990 and 12 January 1990 were openly admitted by the Accused. Even the transaction on 20 January 1990 which culminated in the arrest of the Accused was admitted by him. The bone of his defence was that he was a police informer and he cooperated with the police in order to curtail a drug trafficking syndicate particularly a drug trafficker by the name of Khalid. The conduct of the Accused would surely shed light as to whether the Accused's allegation

was really true. The inherent impediments to the defence story are itemised as follows:

(1) The three transactions on 10 January 1990, 12 January 1990 and 20 January 1990 all centred on the sale and purchase of the ganja. The Accused did not provide any information about Khalid nor about the activity of Khalid, if in fact he really existed, to PW5, PW8 and PW9. There were ample opportunities for the Accused to pass vital information about Khalid to PW5, PW8 and PW9. Yet the Accused failed to do so. Khalid was never introduced to PW5 and Khalid did not appear during the negotiations for the sale, purchase and delivery of the ganja on all three occasions.

(2) The Accused admitted in his defence that he did not know Khalid that well, was not close to Khalid and that he heard that Khalid was involved in drug trafficking. If that was the case how could the Accused cooperate with the police to nab Khalid?

(3) The Accused was very confident that he could get the supplies from Khalid during the three transactions involving 100 kartus of ganja, 400 kartus of ganja and 2,700 kartus of ganja respectively. According to the Accused, payments would only be effected to Khalid after he received the monies from PW5. This points to one direction only, if Khalid really existed, he would be regarded as the supplier or drug trafficker and the Accused would be a member of the drug syndicate. This conclusion is borne out by the admissions of the Accused that on two occasions he was paid RM10 (on 10 January 1990) and RM40 (on 12 January 1990) as commissions by Khalid after the drugs were sold to PW5 by the Accused. It is pertinent to note that though the Supreme Court had ruled in *Public Prosecutor v. Ahmad bin Shafie* [1988] 1 MLJ 255 that the words "on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia" appearing in s. 39B of the Dangerous Drugs Act 1952 (Act 234) do not constitute an element which is essential to complete the offence and may be omitted from the charge without affecting the legality of the charge **yet the conduct of the Accused in this case clearly shows his role to traffic either for himself or for Khalid (if Khalid really exists).** Thus, the Accused would still commit the offence under s. 39B Dangerous Drugs Act 1952 (Act 234) even if one were to accept his story that he received the supply of 925.77 grammes of ganja on 20 January 1990 from Khalid.

(4) The commissions received by the Accused rightly belonged to the Federal Government. The Accused was not sincere and did not cooperate with the police because he failed to return the commissions to PW5 nor informed PW5 about it. On the contrary, the Accused quietly pocketed the commissions on both occasions. Surely this behaviour is not consistent with someone who works/cooperates with the police!

(5) On 10 January 1990 when the Accused was first introduced to PW5 by the informer, surely the Accused would take extra pains in ascertaining whether PW5 was in fact a police officer. The Accused did not ask pertinent questions of PW5 in regard to his (the Accused's) role in combating drug trafficking, for instance:

What was the role PW5 would want the Accused to play? What were the information the police required or wanted in order to combat the drug trafficking syndicate? What sort of Information did the police required in regard to Khalid? What benefit would the Accused obtain after the police had nabbed Khalid or crippled the drug trafficking syndicate? What sort of security measures would the police adopt to safeguard the Accused's safety? All these pertinent questions should have been clarified by PW5 before the Accused took the onerous task of assisting the police in combating the drug trafficking syndicate. From the Accused's evidence on 10 January 1990, when he met PW5 they discussed about the price of the ganja - being RM1.50 for 100 kartus and above. The Accused ascertained the place and time of the delivery of 100 kartus of ganja. The address and telephone number of the Accused were given to PW5 to enable future contacts to be made. Not an iota of evidence to show the pertinent questions as set out above were being discussed. The conduct of the Accused on 10 January 1990 showed confidence that he could

procure the drugs (without even contacting Khalid, if Khalid existed) - indicative that the Accused was a drug trafficker.

(6) The conduct of the Accused on 10 January 1990 at 7.00 p.m. at the scheduled place for the delivery of the drugs defy the claim by the Accused that he acted and cooperated with the police. That night, after meeting PW5 and PW8, the Accused did not straight away hand the 100 kartus of ganja to them. Instead the Accused rode his motorcycle with PW5 and PW8 trailing him from behind in their car to a spot about 200 meters from the scheduled/agreed place of delivery and it was only there that the Accused handed the 100 kartus of ganja to PW5 in exchange for RM150 cash. If the Accused, cooperated with the police, must he take the necessary precaution as discussed above! And during the sale and purchase on 10 January 1990, not a shred of information was relayed to PW5 about Khalid. On the other hand, the Accused on his own accord requested PW5 to contact him on 12 January 1990 for the supply of more drugs. Why didn't the Accused supply information to PW5 about the whereabouts of Khalid? Why didn't the Accused reveal to PW5 the normal haunt of Khalid - the place wherein Khalid normally frequented? The conduct of the Accused on 10 January 1990 reflected the conduct of a drug trafficker. It would have been prudent, if the Accused cooperated with the police, to ask PW5 what would he do before and after the delivery of 100 kartus of ganja. Now, the Accused comes to Court and wants the Court to believe that he assisted the police in regard to this case.

(7) On 12 January 1990 at 5.05 p.m., when PW5 contacted the Accused over the telephone, once again, the Accused set the date, time, place and price of the drugs for delivery. For this second transaction, the Accused and PW5 merely harped about the sale and purchase of 400 kartus of ganja. If the Accused played the role of an informer, as alleged by him, surely the conversation between both of them would have gone beyond the sale and purchase of 400 kartus of ganja. They should be discussing about the drug trafficking activity of Khalid. But this was not to be. According to the Accused at this meeting, PW9 was introduced as Azuan by PW5. This confirms and strengthens the prosecution's case that Azuan acted as an agent provocateur. If the allegations of the Accused that he acted as a police informer, that he cooperated with the police to combat a drug trafficking syndicate, particularly Khalid, why didn't PW5 introduce PW9 as ASP Mohd. Isa bin Abdul Wahab of the Anti Narcotics Division in Ipoh to the Accused. Why must PW9 be introduced as Azuan? Why the need for PW9 to be anonymous or to act as an agent provocateur? Why must PW5 and PW9 act as agents provocateur and not divulge their true identities? The answer is simple: the allegations of the Accused are entirely baseless.

(8) According to the evidence of the Accused, on 12 January 1990 after the Accused had shown the sample of the ganja to PW5 at Simpang Empat, Semanggol, the Accused parted company and **proceeded alone** to meet Khalid at a Malay coffee shop near the road known as Selinsing, the place known to the Accused all along. One question arises: Why didn't the Accused bring PW5 and PW9 and introduce them straight away to Khalid, after all the Accused was said to work with the police? If the Accused had done so, then both PW5 and PW9 could deal direct with Khalid in regard to the sale and purchase of 400 kartus of ganja bearing in mind, according to the Accused, Khalid had earlier agreed to meet PW5. Surely that was the golden opportunity for the Accused to introduce Khalid to PW5 and PW9. Why must the Accused exert himself to the fore to hand the 400 kartus of ganja to PW5 on 12 January 1990 at 8.00 p.m. at Sungai Baru when this could easily be done by Khalid? Surely the Accused's job, if true, as an informer, as a person who cooperated with the police, would immediately come to an end after he has introduced PW5 and PW9 to Khalid. Why must the Accused himself hand the drugs to PW5 on 12 January 1990? Why must the Accused suggest to PW5 to contact him on 20 January 1990 at 5.00 p.m. if more drugs were required? All these questions point to one conclusion: that on 12 January 1990 the name of Khalid as suggested by the Accused was never in existence at all.

"Khalid" is a pure figment of his imagination. It was plain that the Accused was the seller of drugs and he had sold the drugs to PW5 on 10 January 1990 and 12 January 1990. The allegation by the Accused that he cooperated with the police was nothing more than to pull wool over the eyes of the Court. A fruitless attempt indeed.

(9) On 20 January 1990 from the evidence, it was clear that the Accused played a major role. The Accused fixed the price of ganja at RM1.40 per kartus, ascertained the handing over of 2,700 kartus of ganja at Sungai Baru near the night market, and set the time of the delivery at 8.00 p.m. The Accused did not say that it was Khalid that fixed the date, time, place and price of the drugs to be delivered to PW5. If Khalid really existed, why wasn't there evidence that it was Khalid that set the date, time, place and price, etc. for the delivery of the drugs on 20 January 1990? Now, when the Accused met PW5, PW8 and PW9 on 20 January 1990 at 7.00 p.m., he knew the location of Khalid's house and he also knew that Khalid wanted to meet PW5. The question arises: Why didn't the Accused take PW5 to the house of Khalid so that the sale and purchase of 2,700 kartus of ganja could be carried out between Khalid and PW5? And, if the Accused were to take this course of action, every probability that PW5, PW8 and PW9 could arrest Khalid when the latter sold 2,700 kartus of ganja to PW5. Surely this course of action would fit the description of an individual that cooperates with the police in nabbing "Khalid". Furthermore, this course of action would enable the police to arrest "Khalid" easily and ultimately the Accused would receive his RM5,000 reward from the police. Why did the Accused take the bold step in delivering 2,700 kartus of ganja to PW5 on 20 January 1990 when this could have been easily undertaken by "Khalid"? The answers are quiet obvious. "Khalid" never existed and it was the Accused that actively sold the drugs to PW5 on 20 January 1990.

(10) The evidence of the Accused that he went to see Khalid in his house on 20 January 1990 at 7.40 p.m. did not receive the support of both the defence witnesses. Both categorically stated (Azaman bin Saibu and Nayan bin Hashim) that they did not see the Accused at "Khalid's" house on 20 January 1990. Nayan bin Hashim categorically stated that on 20 January 1990 at 7.40 p.m., he did not see the Accused at Khalid's house and at that time Khalid was with him. Nayan bin Hashim also stated that he did not see the Accused on 20 January 1990 when he went out with Khalid to eat. What is important is the assertion by Nayan bin Hashim that even though he knew Khalid, yet, he knew him as a padi planter not as a drug trafficker. Thus, one pertinent point arises: **There is no evidence that the person by the name of Khalid known to both Azaman and Nayan is the same person referred to by the Accused as "Khalid".** My finding is that Khalid is a figment of the Accused's imagination. It is a desperate attempt of the Accused to shift the blame to some one else. Even if I am wrong in my finding, the conduct of the Accused as discussed above clearly shows a conduct that would not run in accord with his defence i.e. to be a police informer to combat a drug trafficking syndicate particularly Khalid.

Nayan stated that he used to see the Accused at the police lock-up when he was detained. Relying on the evidence of Nayan, the allegation by the Accused that he obtained the drugs from "Khalid" on 20 January 1990 at 7.40 p.m. in Khalid's house was a complete lie and a mere concoction.

(11) I hold that the conduct of the Accused in running away and throwing the sling bag (exhibit P5) with its contents should rightly be construed to infer guilty knowledge on his part. **This conclusion must be viewed objectively, looking at the totality of the evidence.** It must be borne in mind, the Accused in his defence, *inter alia*, stated that he acted as an informer and also cooperated with the police to combat a drug trafficking syndicate, particularly Khalid. According to the Accused, he knew that PW5, PW8 and PW9 were all police officers. Thus, when PW10 rushed towards the car and shouted "Police", why must the Accused run? The Accused explained that before PW10

appeared, PW5 after lighting his lighter told the Accused that he would place the Accused under arrest. This brought fear to the Accused and he decided to run away. Under cross examination, the Accused stated that he ran to avoid arrest and if he could escape he would not be charged. Why must the Accused run? He should stand on his feet and explain to PW10 about his role and to avoid arrest, he could have brought the police party to Khalid's house that very night.

(12) In regard to the allegations that the Accused told PW5 that Khalid would be coming on 20 January 1990 and that the delivery of the drugs should wait till Khalid appear, I need only say that these allegations are entirely false. The target all along was the Accused and not Khalid. PW5 lighted his lighter several times before PW10 came followed by other police personnel to arrest the Accused. The members of the police party were all targeting the Accused and no one else. Even the Accused admitted that at the time of his arrest, Khalid was not at the scene. Under cross-examination, the Accused agreed that he did not tell (PW11) (the I.O.) about Khalid.

(13) In regard to Kamsani, the defence sought to establish that Kamsani, a former police informer, who had assisted the police in weeding out drug traffickers in 1988 would now openly conduct business at a stall located behind the Balai Bomba, Taiping. Since Kamsani, if the evidence of the Accused is to be accepted, would be known to all drug traffickers in Taiping, he would surely open himself to danger. The Court is urged to accept this version of the defence. An incredible version which cannot be accepted by any reasonable man. Surely a former police informer, like Kamsani, would not want to endanger his life by openly doing business right smack in Taiping town. An open target for all his enemies to pick on. I reject the defence version on Kamsani forthwith as being inherently incredible. The learned deputy public prosecutor at the bar stated that the name Kamsani did not appear in the investigation file. And that the name "Kamsani" was created by the defence only. I would accordingly accept the assurance of the learned deputy public prosecutor at the bar and held that there is no oblique motive on the part of the prosecution in regard to this person by the name of Kamsani. On the meaning of oblique motive, see *Muharam bin Anson v. Public Prosecutor* [1981] 1 MLJ 222 FC. The prosecution has also urged the Court to draw an adverse inference against the Accused in not calling Kamsani as a defence witness. I have to say that I am not unmindful of this omission. However, it is not the duty of the Court to speculate as to the reasons as to why this person was not called as a witness: see the observations of the Lord President Tun Abdul Hamid in *Pang Chee Meng v. PP* [1992] 2 SCR 1 where his Lordship said:

> Whether the Accused testifies or adopts other means is a matter of choice for him and counsel. No adverse inferences can be drawn or seen to be drawn only because he exercised his liberty to choose any particular course.

(14) It was alleged by the Accused that PW5 agreed not to arrest him if the Accused were to supply the drugs to him. However, on perusal of PW5's evidence, such an allegation cannot be sustained. It must be borne in mind that PW5 acted as an agent provocateur in all his dealings with the Accused. PW5 acted his role extremely well without even arousing the suspicion of the Accused. PW10 monitored the movements of PW5, PW8 and PW9 to the minutest detail until the arrest of the Accused was effected on 20 January 1990. This brings me to the allegation that the Accused knew PW5, PW8 and PW9 as police officers. Throughout the trial, PW5, PW8 and PW9 did not say that their undercover was blown or that the Accused knew them as police officers. It is my finding that PW5, PW8 and PW9 throughout the case acted as agents provocateur and they did not at any time expose their true identity to the Accused. It is also my finding that the allegation of the Accused that he (the Accused) knew PW5, PW8 and PW9 as police officers is nothing more than a fabricated story. It is not probable in the context of the totality of the evidence which I had discussed earlier.

(15) Much fuss was created by the defence that the Accused was not arrested on 10 January 1990 and 12 January 1990 even though he had committed the offences of drug trafficking. PW5, PW8 and PW9 acted on the directions of PW10 and whatever arrest to be made must surely come from PW10. Even PW5 was categorical in stating that he did not arrest the Accused on both occasions (10 January 1990 and 12 January 1990) since PW10 did not direct him to do so. I had in the course of the trial ruled that the transactions on 10 January 1990 and 12 January 1990 are admissible in evidence. It clearly shows system on the part of the Accused. It shows that the Accused had been dealing in drugs before. I believe PW5 when he said that PW10 did not direct him to arrest the Accused on both occasions. This point also fails. This brings me to the allegation that the exhibits in relation to the transactions on 10 January 1990 and 12 January 1990 including the samples were not tendered in Court and therefore it was submitted that there was a gap in the prosecution's case. This argument is totally without substance. The Accused is charged for trafficking in 925.77 grammes of cannabis on 20 January 1990 at the time and place as set out in the charge. Only those exhibits in relation to 20 January 1990 should be produced and has been rightly and correctly produced by the prosecution. The exhibits seized for 10 January 1990 and 12 January 1990 are not material to the charge against the Accused but the transactions on 10 January 1990 and 12 January 1990 are material and admissible in evidence (see *Wong Yew Ming v. Public Prosecutor (supra)*). Even the accused admitted in his defence the transactions that took place on 10 January 1990 and 12 January 1990. At any rate, I accept the explanation by PW10 that the exhibits seized on 10 January 1990 and 12 January 1990 had been destroyed on the instructions of his superior officer, Penolong Pesuruhjaya Polis Hj. Sulaiman bin Ali. It is my finding that there were no oblique motives on the part of PW10, Hj. Sulaiman bin Ali and the prosecution in not producing the exhibits seized on 10 January 1990 and 12 January 1990 together with the samples.

(16) It was contended by the defence that the informer contacted PW10 one year after the incident because he was dissatisfied that the Accused, an innocent man, was arrested. But alas, there was no cross-examination of PW10 on this point (*R. v. Pichimuthu* [1970] 2 MLJ 143, *Wong Swee Ching v. Public Prosecutor* [1981] 1 MLJ 212 and *AEG Carapiet v. AY Derderian* [1961] AIR Cal. 359).

In his defence, the Accused clearly admitted that he knew that he was in possession of 925.77 grammes of cannabis and that he was conscious of such possession (see the meaning of the term "possession" by the Supreme Court in *PP v. Kau Joo Huat* [1988] 1 SCR 293). Having considered the totality of the evidence adduced, on a balance of probabilities, the Accused was selling the cannabis, fully aware and conscious of the cannabis in his possession, for monetary gain. The defence evidence viewed against the prosecution evidence clearly shows he was involved in trafficking the drugs in question. By definition, the term "trafficking" in the Dangerous Drugs Act 1952 (Act 234) is wide and is all encompassing (see *Teh Geok Hock v. Public Prosecutor* [1989] 3 MLJ 162 SC).

It is the finding of this Court that the Accused was not a police informer. It is the finding of this Court too that the Accused's defence that he cooperated with the police to weed out a drug trafficking syndicate, particularly a drug trafficker by the name of Khalid, as a pack of lies calculated to pervert the course of justice. Having seen and heard the Accused and having considered his defence in its entirety as against the prosecution evidence, I did not believe him. I pause here to say that the demeanour of the Accused was at the bottom of the dark dungeon. His credibility was practically zero (s. 271 of the Criminal Procedure Code was complied with).

In the result, I am fully satisfied that the Accused had failed to rebut the presumptions under s. 37(d) and s. 37(da)(vi) of the Dangerous Drugs Act 1952 (Act 234) on the balance of probabilities (see *PP v. Yuvaraj* [1969] 2 MLJ 89 PC, *Ilian and Anor. v. PP* [1988] 1 MLJ 421, *R. v. Carr Briant* [1943] KB 607 and *Tee Geok Hock v. PP* [1989] 3 MLJ 1963). As the quantities of the dangerous drugs, *viz* the 925.77 grammes of cannabis far exceeded the

stipulated amount in s. 37(da)(vi) of the Dangerous Drugs Act 1952 (Act 234), I am satisfied that he did traffic in 925.77 grammes of cannabis on the date, time and place mentioned in the charge.

The prosecution had proved its case beyond reasonable doubt and accordingly, I found the Accused guilty of the offence for which he was charged and convicted him. I sentenced him to death.

Order accordingly.

RUHANI BINTI MOHIAT & ANOR.

v.

ABDUL KARIM BIN MAT ALI & ANOR.

HIGH COURT, KUANTAN
DATO' HJ. LAMIN BIN HJ. MOHD YUNUS J.
[CIVIL SUIT NO. 119 OF 1985]
10 MAY 1993

TORT: Negligence - Claim for damages - Liability - Whether defendants liable - Contributory negligence - Fact deceased not wearing safety helmet at time of accident - Whether constituted contributory negligence - Motorcycles (Safety Helmets) Rules 1973 - Quantum - 1st plaintiff widow of deceased - Dependency claim - 2nd plaintiff owner of motorcycle involved in accident.

PRACTICE AND PROCEDURE: Capacity to sue - Plaintiffs suing as administrators - Action commenced before extraction of letters of administration - Whether plaintiffs had capacity to sue - Sections 2, 30, 31, Probate and Administration of Estate Act 1959.

The plaintiffs filed a suit against the defendants on 14 March 1985 as administrators of Ahmad Bin Yusof, deceased. The deceased had been killed in an accident involving his motorcycle and a bus driven by the first defendant. The deceased was knocked from behind and he was pinned down under the bus. The accident occurred on 28 May 1982 on the road from Kuantan at the junction leading to Felda Bukit Goh. The deceased was not wearing a safety helmet at the time of the accident.

The first plaintiff was the widow of the deceased, whilst the second plaintiff was the owner of the motorcycle which has involved in the accident. The plaintiffs had been granted letters of administration on 11 May 1984, which, however, were extracted only on 6 May 1991.

The defendants made a preliminary objection that the plaintiffs had no capacity to sue as administrators as they were not in possession of the letters of administration at the time of the filing of the suit.

Held:

[1] The plaintiffs had capacity to sue as administrators of the deceased, as the letters of administration had already been granted to them before the date of the filing of the suit.